

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: March 13, 2017

TO: City Auditor

FROM: City Attorney

SUBJECT: Audit of City Boards: Charter Section 43(c) and Vacancies

INTRODUCTION

This memorandum responds to questions from your office related to an audit of City boards created under San Diego Charter (Charter) section 43. The audit considers:

- The process to identify candidates and appoint members to boards, to fill either scheduled or unscheduled vacancies;
- The process to ensure boards comply with applicable transparency requirements and best practices, such as the Brown Act; and
- Processes to create and periodically review the work of boards, and the potential for standardizing their organization and operation.

As part of the audit, your office has asked the City Attorney's Office legal questions related to Charter section 43(c), which states, in relevant part:

(c) Whenever under the provisions of this Charter or ordinance the Mayor is vested with authority to appoint the members of boards or committees and does not take such action within forty-five (45) days after the board or committee has been established or a vacancy occurs, then the Council shall make such appointments

. . . .

Your office suggested the word "shall" (in the phrase "the Council shall make such appointments") "seems to indicate the Mayor loses the authority to appoint after a vacancy has existed for 45 days."

Your office also referred to voter materials from November 4, 1969 when the Charter was amended to include a 45-day rule, which our office independently analyzed.¹ We note that the relevant Charter section had a different impact when enacted, as the Mayor was a member of the City Council at that time and continued to have a voice in the nomination and confirmation process after 45 days had lapsed. The section previously operated to include the rest of the Council, along with the Mayor, in the appointment process after the time lapsed; it did not operate to exclude the Mayor from the process. The effect of this language is different under the Mayor-Council form of governance, as the expressed shift in power to the Council now operates to exclude the Mayor.

The audit is considering the fact that the Mayor, since the Mayor-Council form of governance took effect, has made appointments to City boards and commissions more than 45 days after certain vacancies occurred. In such cases, the late-arriving appointments were still docketed for Council confirmation and confirmed.

QUESTIONS AS STATED BY AUDITOR

1. Under Charter Section 43(c), does the Mayor lose the authority to make appointments to Charter Section 43(a) and 43(b) boards and committees 45 days after a board or committee is created or a vacancy occurs?
2. Does the term “shall” (used in Charter section 43(c)), ultimately mean that only the Council can fill a vacancy after 45 days?
3. Does the term “vacancy” in Charter Section 43(c) apply to scheduled vacancies, unscheduled vacancies, or both?
4. Council Policy 000-13 addresses the 45-day language regarding appointments. Can a Council Policy be used to supersede the Charter?

SHORT ANSWERS

1. Not necessarily. It becomes the Council’s choice whether to docket late-arriving appointments for confirmation. The authority provided in Charter section 43(c) is directory and not mandatory: The Council may exercise the appointment authority in a given instance or confirm late-arriving appointments from the Mayor. The Charter does not operate to prohibit the Council from confirming such appointments, nor does it set a deadline for the Council’s actions. Moreover, a distinction must be made between appointments for boards created under section 43(a) and committees created under section 43(b), as explained below.

¹ See <https://www.sandiego.gov/sites/default/files/legacy/city-clerk/elections/city/pdf/pamphlet691104.pdf>. Former section 43.1, no longer in the Charter, said that after the Council has “failed or refused to confirm two successive nominations of the Mayor,” the nominations and appointments shall be by vote of the Council – which still included the Mayor as a member. The section was repealed in 1969, replaced by the current 45-day language in a new section 43(c).

2. No, the word “shall” used in this context is directory and not mandatory, as explained above and in the analysis below.

3. The term “vacancy” is not limited or defined in Charter section 43(c). It must be harmonized, and considered in context, with other Charter sections, which give the Mayor “sole” authority to fill all vacancies on boards and commissions. The term thus is interpreted broadly to include both scheduled and unscheduled vacancies.

4. A Council Policy cannot supersede or contravene the Charter, which is the City’s constitution and its supreme local law. A Council Policy can work in harmony with the Charter, however, by adding procedures that will carry out what the Charter intends. Council Policy 000-13 adds procedures, and does not supersede or contradict the Charter.

BACKGROUND

The City has more than 50 active boards created under Charter section 43(a) by ordinance of the Council. The City also has more informal citizens’ advisory committees, created under Charter section 43(b) and approved by resolution, that may be set up to report to the Mayor or to the Council.

Members of Charter section 43(a) boards are appointed to specific terms, often in defined categories, and must meet Municipal Code requirements for appointment, which vary according to a board’s governing law. Members of Charter section 43(a) boards are appointed by the Mayor, subject to Council confirmation, and then to mayoral veto. Such appointments are accomplished by resolution.

Members of Charter section 43(b) citizens’ advisory committees are appointed once and continue serving until the committee completes its work advising on questions with clearly defined objectives. Such committees automatically dissolve upon the completion of the objectives for which they were created. Appointments are made by whoever creates the committee – the Mayor or the Council – and may be accomplished by memorandum of the Mayor or resolution of the Council. If a member leaves a position on a Charter section 43(b) committee before its work is complete, the vacancy would be filled the same way: by memorandum from the Mayor for a mayoral advisory committee or resolution of the Council for a Council advisory committee. There is no role for either the Council or Mayor in a citizens’ advisory committee under section 43(b) that answers to the other, or that was not set up to answer to both.

Charter section 43(c) provides that whenever the Charter or Municipal Code give the appointment authority to the Mayor, and the Mayor does not take action within 45 days after the board or committee is established or a vacancy occurs, then the Council “shall make such appointments.” This provision is interpreted to apply only to a Charter section 43(a) board, as members of a citizens’ advisory committee do not have set terms and are appointed once by the person or entity it advises. As the Council has no role in confirming appointees to a section 43(b) mayoral advisory committee, it would be legally contradictory for the Council to fill a vacancy on such a committee. Thus, this memorandum considers section 43(a) board vacancies only.

ANALYSIS

I. THE CHARTER GIVES THE MAYOR A DEADLINE TO MAKE APPOINTMENTS TO SECTION 43(a) BOARDS BEFORE THE AUTHORITY SHIFTS, BUT THE COUNCIL CAN CHOOSE NOT TO EXERCISE THAT POWER; THE COUNCIL WAIVES ITS RIGHT TO APPOINT WHEN IT CHOOSES TO CONFIRM LATE-ARRIVING APPOINTMENTS.

The Mayor is responsible for hundreds of appointments to more than 50 City boards created under Charter section 43(a). The Council is responsible for confirming those appointments. San Diego Charter § 43(a). Council Policy 000-13 details procedures to accomplish this, which include a process for gathering nominations from Councilmembers to fill positions and determining how confirmation will be docketed for hearing by the Council.²

When voters approved the Mayor-Council form of governance, they approved Charter amendments retaining the Mayor's "authority to appoint members of City boards, commissions, and committees, subject to Council confirmation" in Charter sections 41 and 43. San Diego Charter § 265(b)(12). The Council retained its powers "to establish committees of the Council and to establish advisory boards and citizen committees as provided for in Charter section 43." San Diego Charter § 270(e). This includes the Council's power to remove committee and board members by majority vote; and to appoint members to any such boards or committees should the

Mayor fail to do so within 45 days of a vacancy occurring, or after a board is established. San Diego Charter § 43(c). Amendments added language reiterating the Mayor's "[s]ole authority to appoint City representatives to boards, commissions, committees and governmental agencies, unless controlling law vests the power of appointment with the City Council or a City Official other than the Mayor." San Diego Charter § 265(b)(12) (emphasis added).

The first two questions posed by the Auditor's Office are essentially the same and are addressed together: After 45 days pass and there is no action by the Mayor to make appointments, (1) does the Mayor lose the authority to make appointments; and (2) does the term "shall" used in the Charter ultimately mean that only the Council can fill a vacancy at that point? Both questions require legal analysis of the phrase "shall make the appointments."

² Council Policy 000-13 states in relevant part: "*Nomination and Appointment*: Unless otherwise specified by Charter, ordinance, or other controlling authority, Councilmembers may submit to the Mayor one nominee for each vacancy. The nomination should include the nominee's resume and completed application. Similar to unclassified employees, nominees will be required to undergo a background check and, if relevant to the position being sought, a financial inquiry. Nominations to fill an expired term must be submitted to the Mayor no later than 30 days before the expired term ends. However, the Mayor may consider nominations submitted after the 30-day period. Nominations to fill an unscheduled vacancy must be submitted to the Mayor within 15 business days of the date the Clerk posts the notice of the unscheduled vacancy. After the relevant time period has passed, and upon receipt of the Mayor's memorandum, the Council President will place the matter of the appointment on the next available regularly scheduled Council meeting docket."

A. The Charter's Use of the Word "Shall" is Directory, Not Mandatory, Giving the Council a Choice of Whether to Exercise the Power.

Requirements relating to the time within which an act must be done are directory rather than mandatory unless the Legislature clearly expresses a contrary intent. *Edwards v. Steele*, 25 Cal. 3d 406, 410 (1979). "In ascertaining probable intent, California courts have expressed a variety of tests. In some cases focus has been directed at the likely consequences of holding a particular time limitation mandatory, in an attempt to ascertain whether those consequences would defeat or promote the purpose of the enactment. [Citations.] Other cases have suggested that a time limitation is deemed merely directory 'unless a consequence or penalty is provided for failure to do the act within the time commanded.' [Citations.]" *Id.* The consequence or penalty must have the effect of invalidating the government action in question if the limit is to be characterized as "mandatory." *Morris v. County of Marin*, 18 Cal. 3d 901, 908 (1977) (disapproved on other grounds in *Caldwell v. Montoya*, 10 Cal. 4th 972, 978, n.8 (1995)). Thus, as a general rule, a 'directory' or 'mandatory' designation does not refer to whether a particular statutory requirement is 'permissive' or 'obligatory,' but instead denotes whether the failure to comply with a particular procedural step will have the effect of invalidating the governmental action to which the procedural requirement relates.

In the case of section 43(c), there is a single stated consequence: a transfer of authority. If the Mayor fails to make an appointment during the applicable 45-day period, the Council assumes the power to make that appointment. There is no stated consequence if the Council chooses *not* to exercise that power.

Charter section 43(c) shifts the power after 45 days to give the Council a choice: it can take responsibility for making appointments or it can docket late-arriving mayoral appointments. Significantly, the Charter does not include language that would invalidate any appointments the Mayor may make at a late date, underscoring that this is a directory, and not mandatory, rule.

Council Policy 000-13 provides a process for how the Council will notify the Mayor should it wish to assume the power for a given appointment. The Council has expressed a policy of providing the Mayor with additional time beyond the 45 days because of the realities of finding and vetting qualified candidates. (See discussion on p. 8 of this Memorandum.)

Although the Charter states that the Council "shall" make the appointments after the 45-day period, the Council waives its ability to claim that power when it docket late-arriving appointments for confirmation. *This is the Council's choice.* Significantly, nothing in the Charter states that the Mayor's late-arriving appointments are invalidated if the Council chooses to confirm them. In fact, the Charter never sets a deadline for any Council action, whether it makes its own appointments or confirms those from the Mayor. The Council already has a role to play in the appointment process, as the Mayor's appointments cannot advance without Council confirmation. Regardless of how it chooses to proceed, the Council plays a significant role in ensuring that board and commissions are fully staffed, which is the purpose of the 45-day rule.

B. The Council May Choose Not to Exercise the Appointment Power, but to Confirm Late-Arriving Mayoral Appointments to Effect the Purpose of the Charter Section.

In construing a statute, a court may consider the consequences that would follow from a particular construction and will not readily imply an unreasonable legislative purpose. Therefore, a practical construction is preferred. *People ex rel. Riles v. Windsor University*, 71 Cal. App. 3d 326, 332 (1977). “[W]e do not construe statutes in isolation, but rather read every statute ‘with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.’ ” *Horwich v. Superior Court*, 21 Cal. 4th 272, 276 (1999).

The ballot argument in favor of the November 1969 Charter amendment said the measure was designed “[t]o guarantee that essential advisory functions be continuous,” and thus the Charter should specify that if the Mayor does not fill commission, board, or committee vacancies within 45 days, the appointment shall be made by the Council. (See Voter Pamphlet, November 4, 1969 election, at 28, <https://www.sandiego.gov/sites/default/files/legacy/city-clerk/elections/city/pdf/pamphlet691104.pdf>). As set forth above, at the point of its enactment the provision operated to add the rest of the Councilmembers to the appointment process, not to exclude the Mayor, as the Mayor was a member of the Council.

As the ballot argument confirmed, the purpose of the provision is that appointments and reappointments be made in a timely fashion: the time limit appears designed so boards and commissions may function with a full roster of members, without needing more members to reach a quorum, and so they can conduct business without interruption. We do not have information regarding how long it routinely has taken the Mayor or Council to act after vacancies have occurred. It is possible, however, that Council confirmation of late-arriving appointments allows certain appointments to be made more efficiently and quickly in some instances than if the Council took responsibility to start finding qualified people to fill the spots at that late date.

If the appointment process is underway by the Mayor’s Office, the Council may well wish to provide flexibility to allow the Mayor additional time and still ensure appointments are made as timely as possible. Providing additional time and confirming appointments made later may, in some instances, become more practical than a situation that cuts off jurisdiction of the Mayor regardless of the time and resources expended to find appointees. As a “directory” clause in the Charter, section 43(c) provides the Council the power to choose how it wishes to proceed.

II. THE TERM “VACANCY” IN CHARTER SECTION 43(C) IS NOT DEFINED AND MUST BE CONSTRUED AS ALL-INCLUSIVE, COVERING SCHEDULED AND UNSCHEDULED VACANCIES, AS THE MAYOR IS EMPOWERED TO FILL BOTH.

The next question is whether the term “vacancy”³ in Charter Section 43(c) applies to scheduled vacancies, unscheduled vacancies, or both.

The Mayor is empowered by the Charter to make appointments to fill any vacancy on a Charter section 43(a) board – whether scheduled or unscheduled. The Charter does not define the term “vacancy” in section 43(c) and thus its meaning must be harmonized with the Mayor’s appointment powers throughout the Charter. The definition of “vacancy” must be considered with the fact the section refers to “[w]henver under the provisions of this Charter or ordinance” the Mayor has authority to appoint members. (Emphasis added.) Charter section 265(b) also gives the Mayor “sole” authority to fill vacancies on Charter section 43(a) boards. Thus, the definition must be construed to cover both scheduled and unscheduled vacancies.

A. The City Clerk’s Procedures to Notice Vacancies Meet Government Code Requirements

Related to this issue, your office asked whether the City is in compliance with California Government Code (Government Code) sections 54970 through 54972,⁴ which require the City to prepare an appointments list containing: (1) all appointive terms that will expire during the next calendar year; (2) notice of any unscheduled vacancy; and (3) the qualifications for each position. Your office asked whether the Clerk’s Office is in compliance if the information is not included in a *single list*.

The Clerk’s Office prepares a matrix including all of the information – terms, notices, members and qualifications – that it distributes each quarter to the Mayor, Council and Auditor to meet statutory requirements regarding the list.

The website also lists scheduled and unscheduled vacancies as required by the Government Code. The same webpage links to a web page for each board and commission, with links to the ordinances setting forth qualifications for members. All of this information is available on the City’s website. The link states that each board or commission website includes a description of its responsibilities, a list of its members and its conflict of interest code, if applicable.

³ Vacancies on City boards arise when someone resigns, dies, is removed by a vote of the Council, or reaches the end of a term. Charter section 43 boards include provisions, many in their governing Municipal Code sections, stating that members whose terms expire, and who have not formally resigned, hold over in their seats until their successor is appointed. Unscheduled vacancies are any that do not coincide with the end of a term.

⁴ The Government Code sections apply to Charter cities, as specified in Government Code section 54971.

Your office has suggested that all of this information needs to be on one list. We believe the matrix meets the requirement. This is supplemented by the information readily available on the City's website, providing the public access to all the required information in one location.

We also note the Government Code suggests the City is to maintain the list annually and can charge the public for the list. Cal. Gov't Code § 54973. The City keeps lists current online and makes them freely available.

III. A COUNCIL POLICY CANNOT SUPERSEDE THE CHARTER, BUT CAN PROVIDE PROCEDURES TO CARRY OUT WHAT THE CHARTER REQUIRES.

Finally, your office noted that the Council Policy 000-13 includes a provision that gives the Mayor flexibility with the 45-day rule regarding appointments, as follows, in relevant part:

... the Council acknowledges that the application and background check process for candidates can require additional time, and therefore may consider Mayoral appointments received after the 45-day period. The Council President will provide 10 business days' written notice to the Mayor if the Council intends to assume the appointment process per Charter sections 41 or 43(c). If the Council assumes the appointment process, it will follow the procedures set forth in Section C of this Council Policy, below. (Emphasis added.)

Council Policies are the policy statements of the City Council not covered by ordinance. Council Policy 000-01 establishes a "Council Policy Manual" which contains "all City policy statements adopted by resolution of the City Council." This Council Policy states in relevant part, "[t]he City Council of the City of San Diego is charged with the responsibility of establishing municipal policies to guide the various functions of the City and, where necessary, to establish procedures by which functions are performed."

Council Policy 000-13 states as its purpose: "It is the intent of the City Council to establish a uniform procedure for the appointment and confirmation of members of commissions, boards, committees, authorities, and districts pursuant to the provisions of this policy. This policy will apply unless it conflicts with the City Charter, ordinance, corporate bylaws, or other controlling legal authority."

As set forth above, the Council's authority to make appointments under Charter section 43(c) is directory and not mandatory, and thus the Council Policy does not conflict with that authority. It is a policy decision of the Council as to whether it wishes to exercise the appointment power in a given instance. The policy provides a framework for the process and avoids confusion about the roles that the Mayor and Council play in light of the Mayor-Council system of government. It sets a procedure for the instances in which the Council chooses to exercise the appointment power.

CONCLUSION

Charter section 43(c) was enacted to ensure the City's boards have a full roster of capable members and that their work continues uninterrupted by a flow of unfilled vacancies. The provision that allows the Council to make appointments when the Mayor has not done so within 45 days of a vacancy is directory and not mandatory. After the time has passed, it becomes the Council's choice as to how to proceed: The Charter gives the Council the power to choose whether to exercise the appointment authority in a given instance or to confirm late-arriving appointments from the Mayor. The Charter provision does not operate to prohibit the Council from confirming late-arriving appointments, nor does it set a deadline by which the Council must make or confirm appointments from the Mayor or directly from the Council.

The Council, recognizing the difficulties and realities of finding capable people to staff numerous boards, has provided additional flexibility in a Council Policy, indicating its desire to work with the Mayor to carry out what the Charter intends. If the Council desires to be more proactive and assert its authority under the 45-day rule to make appointments in a given instance, the Council is empowered to make that policy decision.

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Doc. No.: 1457359
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